Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)	
	)	
Petition of National Association of Broadcasters	)	MB Docket No. 04-160
Regarding Programming Carried By	)	
Satellite Digital Audio Radio Service (SDARS)	)	

To: The Media Bureau

REPLY COMMENTS
SUBMITTED BY MEDIA ACCESS PROJECT ON BEHALF OF
COMMON CAUSE
THE BENTON FOUNDATION
NATIONAL FEDERATION OF COMMUNITY BROADCASTERS
OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, INC
THE CENTER FOR DIGITAL DEMOCRACY,
FREE PRESS
AND
THE NEW AMERICA FOUNDATION

Common Cause, *et al.* submit these brief reply comments to stress one point: while they agree that Sirius Satellite Radio, Inc. and XM Radio, Inc ("SDARS Licensees") are on firm ground in placing their focus on upon the listening public's First Amendment right to receive information, the SDARS Licensees nonetheless seek to have the Commission apply an incorrect First Amendment standard in this proceeding. The result would be to undermine the public's "paramount" right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences...." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 391 (1969).

The SDARS Licensees quite properly call on the Commission to recognize the public's right to have access to information and ideas. Accordingly, the SDARS Licensees correctly focus on the right of the listening public to ***receive*** information, including the kind of local weather and traffic services that the SDARS licensees, among others, provide. *Opposition of Sirius Satellite Radio, Inc.*

and XM Radio, Inc., at 14. As Common Cause, *et al.* have explained in their June 8, 2004 *Request to Hold in Abeyance and Contingent Comments*, the current state of the record does not enable the Commission to pass judgment at this time as to whether the public's needs are adequately met by terrestrial radio licensees.

However, the SDARS Licensees also argue that the appropriate standard for review is either heightened scrutiny or intermediate scrutiny. *Opposition of Sirius Satellite Radio, Inc. and XM Radio, Inc.*, at 13-14. *See also Opposition of Satellite Broadcasting and Communications Association* at 14. The correct standard of review, however, is the same rational basis scrutiny that governs terrestrial broadcasting.[1]

The SDARS licensees do not offer any explanation for why regulation of SDARS is subject to intermediate scrutiny.[2] *Opposition* at 14. SDARS Licensees offer no reason why the logic of *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 974-77 (D.C. Cir. 1996), *suggestion for reh'g en banc denied,* 105 F.3d 723 (D.C. Cir. 1997) and *National Association of Broadcasters v. FCC*, 740 F.2d 1192, 1202 (D.C. Cir. 1982) does not apply. In both cases, the D.C. Circuit found that Direct Broadcast Satellite (DBS) licensees were subject to the same rational basis scrutiny as

---

[1]The SDARS Licensees' Fifth Amendment argument (*Opposition* at 14 n.49) is wholly without merit. Such claims have never been upheld in the context of a spectrum license. As the Communications Act makes clear, no licensee has a property interest in a license. 47 U.S.C. §301. *See FCC v. Sanders Bros Radio Station*, 309 U.S. 470, 475 (1940). Every licensee explicitly waives any claim of a property interest as against the regulatory power of the United States. 47 U.S.C. §304. Award of a license via auctions does not in any way alter this regulatory truth and convert a license into a property interest; licenses awarded *via* auction are no more property than other spectrum licenses. 47 U.S.C. §309(j)(6)(B); *In re Nextwave Personal Communications, Inc.*, 200 F.3d 43, 50 (2nd Cir. 1999).

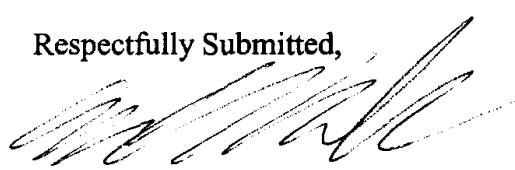
[2]SDARS Licensees do not invoke the phrase "intermediate scrutiny," and leave ambiguous the nature of review they seek. Common Cause, *et al.* understand from the *Opposition* that SDARS Licensees reject application of the correct standard – rational basis.

terrestrial broadcasters. SDARS does not differ from DBS in any meaningful way for purposes of First Amendment analysis. Both services use public spectrum and enjoy the exclusivity of use provided for under the Communications Act.

To the extent that the SDARS Licensees appear to argue that any attempt to distinguish between local and non-local content is inherently "content based" within the meaning of First Amendment jurisprudence, the law is clearly to the contrary. The Supreme Court and other courts have routinely rejected this argument. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 648-49 (1994); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 168-69 (D.C. Cir. 2002).

WHEREFORE, the Commission should grant the previously filed *Motion* and hold this proceeding in abeyance until the Localism Task Force completes its work and the Commission receives its final report and recommendations.

Respectfully Submitted,



Harold Feld
Andrew Jay Schwartzman
MEDIA ACCESS PROJECT
Suite 1000
1625 K Street., NW
Washington, D.C. 20006
Tel: (202) 232-4300
Fax:: (202) 466-7656

June 21, 2004

CERTIFICATE OF SERVICE

I certify that the foregoing *Reply Comments* was served by first class mail on the foregoing:

Jack N. Goodman
Jerianne N. Timmerman
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036

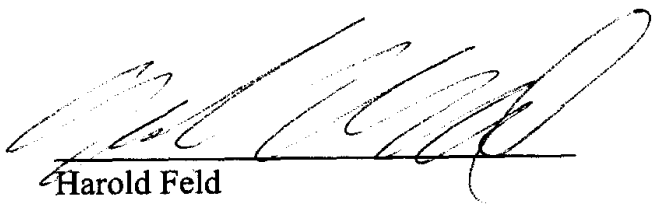
Michael Petricone
Consumer Electronics Association
2500 Wilson Blvd.
Arlington, VA 22201-3834

Richard DalBello
Satellite Broadcasting and
Communications Association
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

Patrick L. Donnelly
Sirius Satellite Radio Inc.
1221 Avenue of the Americas
New York, NY 10020

Lon Levin
XM Radio Inc.
1500 Eckington Place, NE
Washington, DC 20002

Charles R. Naftalin
Reginal J. Leichty
Holland & Knight
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006



Harold Feld